LE COPY

JUN 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 125

WAYNE HARSH,

Petitioner,

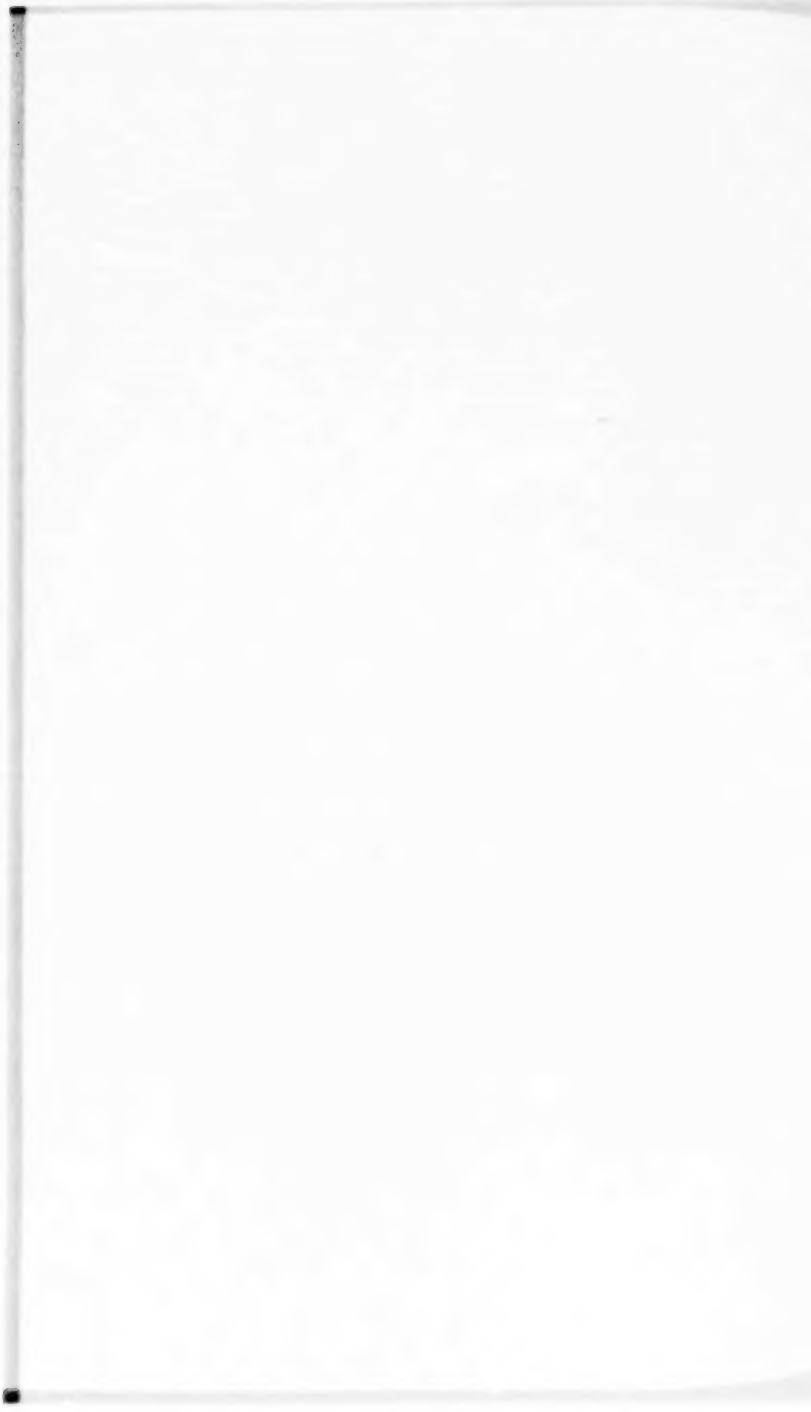
vs.

ILLINOIS TERMINAL RAILROAD COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

MORRIS B. CHAPMAN,
Counsel for Petitioner.



BLEED THROUGH POOR COPY

INDEX

	Page
Petition for writ of certiorari	1
Jurisdiction	1
Opinions below	2
Questions presented for review	2
Reasons relied on for allowance of Writ	3
Statement of the Case	4
The Statutes involved	11
Argument	12

Authorities Cited

Bailey v. *Central Vermont Ry. Co.*, 319 U.S. 350	12
Bolin v. *Lehigh Valley Ry. Co.*, 167 Fed. 934	14
Boston & M. R.R. Co. v. *Cabana*, 148 Fed. (2d) 150	14
Chapman v. *Alton Ry. Co.* (C.C.A. 7th Cir.), 117 Fed. (2d) 669	14-16
Ellis v. *Union Pacific Ry.*, 329 U.S. 649	12-14
Grand Trunk W. Ry. Co. v. *Heattie*, 48 Fed. (2d) 739	14-16
Henwood Trustee of St. Louis Southwestern Ry. Co. v. *Chaney*, 156 Fed. (2d) 392	14-16
Lavender v. *Kurn Trustee of San Francisco Ry. Co., etc.*, 327 U.S. 645	14-16-20
Nickell v. *B. & O. Ry. Co.*, 106 N.E. (2d) 739	14-18
Robertson v. *Louisville & N.R. Ry. Co.*, 327 Ill. App. 44, 63 N.E. (2d) 608	18
Stawczak v. *Pa. Ry. Co.*, 174 Fed. (2d) 43	14
Stanford v. *Pa. Ry. Co.*, 171 Fed. (2d) 632	14
Tennant v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29	13-14-20
Tiller v. *Atlantic Coast Line R. Co.*, 318 U.S. 68, 87 L. Ed. 618, 63 S. Ct. 444, 143 A.L.R. 967	15
Waddell v. *Chicago E. I. Ry. Co.*, 142 Fed. (2d) 309	14-15
Washington & G.R. Co. v. *McDade*, 135 U.S. 554, 571, 572, 34 L. Ed. 235, 241, 242, 10 S. Ct. 1044	15
Wilkerson v. *McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497	18

Page

Williams v. *N.Y. Central Ry. Co.*, 402 Ill. 494, 84 N.E. 399 12-14

Witherbee v. Elgin, Joliet & Eastern Ry. Co. (C.C.A. 7th C.), 191 Fed. (2d) 302 14

STATUTES CITED

28 U.S.C. Sec. 1257 (3) 1

45 U.S.C. Sec. 1 through 50 11

45 U.S.C. Sec. 51 et seq. 11

Ill. Rev. Stat. Ch. 110, Sec. 199 (2c) 11

TEXTBOOK CITED

Moore—"Recent Trends In Judicial Interpretation in Railroad Cases Under the Federal Employers Liability Act"—29 Marquette L. Rev. 73 16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 125

WAYNE HARSH,

Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

To the Honorable the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Wayne Harsh, respectfully petitions that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Illinois, entered in this case on March 10, 1954.

Jurisdiction

The judgment of the Supreme Court of Illinois was entered on March 10, 1954 (R. 154). The jurisdiction of this Court is invoked under 28 U.S.C.A. Para. 1257 (3).

This action was brought pursuant to Title 45 Section 23, same being a portion of what is commonly known as, the "Safety Appliance Act", being a companion act to the Federal Employers Liability Act. Plaintiff's Complaint was instituted charging the defendant specifically with violating the foregoing section of the Code (R. 12(3)). There is no issue as to the applicability of the act, and the Appellate Court of Illinois for the Fourth District decided this action conceding that it was governed by the provision of the Safety Appliance Act (R. 26.)

Opinions Below

The opinion of the Appellate Court, for the Fourth District of Illinois is found in 351 Ill. App. 304, 114 N.E. (2d) 901. Following the opinion of the said Appellate Court, petitioner, pursuant to Rule 75 (2c) of the Civil Practice Act of Illinois (Illinois Revised Statutes 1953, Chapter 110, Section 199, (2c)) struck the remanding portion of the Appellate Court's decision, thereby making same final and reviewable by leave to appeal to the Illinois Supreme Court (R. 150).

The Supreme Court of Illinois denied petitioner's leave to appeal (thereby making the judgment final by the highest Court of Illinois) without written opinion (R. 154).

Questions Presented for Review

1. Whether the state or Federal law governs the right of a state Appellate Court to set aside a jury's verdict, in an action under the "Safety Appliance Act", (45 U.S.C.A. Secs. — *et seq.*) as being contrary to the manifest weight of the evidence.

2. Whether the Appellate Court was correct in holding that petitioner's evidence concerning the defect in the car in question was against the manifest weight of the evidence.

BLEED THROUGH POOR COPY

Reasons Relied On for Allowance of Writ

1. The Appellate Court for the Fourth District of Illinois, in an opinion now approved impliedly and made final by the Supreme Court of Illinois by its failure to grant leave to appeal, has boldly asserted its authority to usurp the function of the jury and to weigh the evidence, after holding that plaintiff had a submissible action in this case, which was brought under the Safety Appliance Act.

2. This holding is directly contrary to the holdings of this Court; those of the various inferior courts of Federal jurisdiction, and to the Appellate Courts of Illinois, including the very Court which decided the case at bar.

3. This Court has repeatedly held, that although Federal Employer and Safety Appliance cases may be instituted in State forums, by virtue of statutory permission in the acts, that the rights sought thereunder are Federal rights and that the law governing the adjudication of such cases is the Federal law. This Court has further held, that it is incumbent upon state courts in these cases to follow the applicable Federal law, rather than state authorities to the contrary.

4. In repeated cases brought to this Court where state courts have failed to follow the proper Federal authority in the particular case, this Court had admonished the state court and has granted certiorari to review and grant relief to a party deprived of his right to a trial under the proper Federal law in a state court.

5. It is, therefore, incumbent upon this Court in the present case to grant certiorari, because to fail to do so, is to not only to sanction the unlawful authority usurped by the Illinois Court in the present case, but to also permit a precedent to stand, whereby all state courts may each consider itself free to adjudicate each and every phase of Federal employer cases by their own particular rules and precedents. This would not only be in derogation of the clear Congres-

sional intent in enacting the acts to have their application governed by Federal law, but would also be in direct opposition to the previous holdings of this Court to the contrary.

6. The holdings of the applicable Federal authorities, including those of this Court are, that the reviewing courts in cases arising under the Federal Employer and Safety Appliance Acts are not, after finding there was a submissible case, to weigh the evidence or to search the record for some other theory or to substitute their opinion for that of the jury. In the case at bar the state reviewing court is guilty of not only weighing the evidence after having held there was a submissible case, but also of searching the record for an inconsistent theory whereby it could differ with the jury and reverse the case thereby.

The foregoing action by the Illinois Court has resulted in a direct conflict existing between the holdings of the Supreme Court of Illinois and those of the various United States Circuit Court of Appeals and of this Court as well in regard to the following question—Does a reviewing Court in an action under the Federal Safety Appliance or Federal Employers Liability Act have the authority, after having determined that a submissible case for the jury was presented by plaintiff, to then, hold such verdict to be contrary to the manifest weight of the evidence and to reverse on this ground? All Federal Authorities say no. The Illinois Supreme Court says yes.

Statement of the Case

On April 25, 1950, petitioner Harsh was a conductor on an interurban electric car operated by defendant between St. Louis, Missouri, and Alton, Illinois (R. 56). On the date in question he was working on a three-car train of defendant, which left Alton, Illinois, at 7:00 A. M. and arrived in the tunnel of defendant's depot in St. Louis about 7:50 A. M. (R. 56).

Upon arriving in the tunnel petitioner got off the car so as to set the switch and permit the train to go in on Track Three, the proper one for it (R. 57). While proceeding to cross the switch one of the two trolley poles which were supplying electricity to the cars jumped the wire, failing to proceed unto Track Three. One of petitioner's co-employees got off the car, pulled the pole down and placed it under the safety hook (R. 57).

As the train then proceeded on, the trolley pole on petitioner's car jumped the track and he got off of his car to reset the pole and was in a position between the first and second car (R. 57).

On each car near the center there is a retriever. It is situated about five and one-half feet from the level of the ground (R. 57). The retriever is attached by a rope to the trolley pole. When the trolley jumps the wire there is a sudden pulling out of this rope, which causes the retriever to operate and to wind the rope onto the retriever, thus lowering the trolley pole so that it will not strike cross wires or interfere with the continued passage of the car. The specific interworkings of the retriever are detailed by petitioner's mechanical engineer (R. 80 through 85).

After the trolley has jumped the wire and the retriever has retrieved the trolley pole it is necessary to reset the retriever (R. 58). When the retriever has become wound after a sufficient amount of winding, it locks and becomes set and the tension of the rope is gone and the rope can be played freely back and forth on the retriever (R. 58). After the retriever has been rewound it can be set again on the pole by a slow releasing of the rope and permitting a gradual ascension of the trolley pole to the line (R. 58). If the trolley were slowly permitted to ascend, then it is agreed that the retriever if properly operating, should not retrieve (R. 81).

Petitioner on the instance in question first pulled out the rope to rewind the retriever (R. 58). While resetting the trolley pole, and while permitting the rope to be played out in a slow manner, because of a defect in the retriever, the retriever suddenly operated, pulled petitioner between the two cars, severely injuring petitioner's back (R. 58). Petitioner stated that when the retriever pulled him it was as if he had been struck by something, and it immediately occasioned a terrible pain down his head and back (R. 58).

Unable because of his pain to reset the retriever on the pole in question, petitioner set the pole on the car behind (R. 59).

This pole was setting the opposite direction for the then forward motion of the car, and the car was backed into the tunnel against the pole, a situation used only in case of emergency (R. 59).

Petitioner was corroborated by defendant's witness Elder regarding the fact that the retriever was pulled out by him and that rather than placing that trolley on the line, which was the normal thing to do, he hooked it on the hook and set the pole on the other car (R. 122).

Also, petitioner, on returning to his car, was observed with a pained expression on his face and noted to be less nimble and agile as usual (R. 87). Without objection, petitioner's witness Gages testified that Harsh told him upon coming back to the car that he had hurt himself (R. 89).

Unable to aid in the discharge of his passengers as was his usual custom, Harsh rode dead-head back to Granite City with his crewmen (R. 59, 60). While returning with the crewmen he told two of them of his injury (R. 60). These employees testified for the Company at the trial and denied Harsh had told them about the injury.

Harsh stated his pain subsided somewhat, and that after he returned to the yards in Granite City, he went to his

PLEASE THROUGH POOR COPY

home (R. 59, 60). He was too ill to eat his breakfast and laid in bed for a short while (R. 60). Having made previous arrangements to assist in a roofing job in Wood River, he drove to Wood River (R. 60). While at the home of his friend and co-employee, Phillips, he called his wife and directed her to report him off work because he felt ill (R. 60). He was to go back to work at 2:10 in the afternoon for the second part of his split shift (R. 60).

Returning home about two in the afternoon, he stated his back was hurting more and more as time went on (R. 62). That afternoon he reported to defendant's dispatcher, Quigley, that he was injured on the morning run and received a slip for the hospital and doctor (R. 62).

He went to Dr. Grzesk, whom he believed to be a company doctor. The doctor examined him, gave him a hypodermic, and sent him home to bed (R. 62).

He didn't return to work until the following Sunday, being in great pain during this period (R. 62).

He suffered pain in his prostate and was sick to his stomach, being unable to eat or keep food down (R. 63). When able, some three days after his injury, on April 28, 1950, he went to the defendant's office and made a report of his injury, which was placed in evidence as Petitioner's Exhibit I. This report corroborates petitioner's version of his injury precisely as he testified at the trial. He noted in this report that the retriever was defective and that its sudden retrieving had drawn him in over the drawbar and injured him.

Petitioner was referred by defendant to several other local doctors who examined him but did not testify in the case. He was finally ordered by Company Doctor Hamm on May 19, 1950, to Missouri Pacific Hospital (R. 64). He was admitted there as a service employee, with a service injury, and his admission was approved by the general superintendent of defendant company (R. 64). This was marked on

his entry card (R. 64). He remained there until the 30th, being examined by various doctors but receiving little relief (R. 64).

He continued to treat with Dr. Grzesk of Granite City and was doing so until the time of the trial (R. 65).

During the intervening time, he has been wearing a canvas belt on his back for support and at times his pain would be alleviated, other times he was severely affected by pain and was unable to pick up or move things, even his baby. This was his condition at the time of the trial on September 19, 1951 (R. 65).

Petitioner testified to specific days of loss of work amounting to over $600.00 and in addition testified there were periodical times when he was unable to work (R. 65, 66). Although he had no complete record of his actual time lost, he also testified that he would sometimes go in the morning, work only two or three hours and then have to be relieved because of his sickness and hurting (R. 72).

Petitioner's wife told of observing petitioner's inability to work and flushed face when he arrived home on the morning in question (R. 101). She stated she had seen the petitioner go to work on occasions when he was unable to do so because he had to support the family (R. 101).

Petitioner's family consisted of himself, wife and four children, ranging in ages from a year and a half to 13 years old (R. 101).

Petitioner's attending physician, Dr. Leo Grzsek, testified concerning petitioner's injury. He was experienced in industrial surgery (R. 90). While in the service, the doctor was at LaGuadia General Hospital working on intervertebral disks as a surgeon (R. 90). While at this hospital, 90% of his work was of this type (R. 90). He did some of the original research work at that time in pantopaic, a contrast medium injected in the spine for X-ray purposes, which aids in the diagnosis of some disk conditions (R. 90).

The doctor testified fully about the condition of petitioner and his treatment. He testified as to the various neurological changes which had occurred in petitioner (R. 92). He stated definitely that petitioner had a concealed herniated disk (R. 92). This type of disk does not disclose itself in the X-rays made for that purpose (R. 93).

The doctor stated that a disk results from stress pain or degeneration of the pulpy material between the vertebrae causing impingement of the nerve (R. 93). Petitioner's disk he stated was of traumatic origin (R. 54).

The doctor testified that surgery might cure petitioner's condition, but is used particularly for relief of pain (R. 94). His prognosis of petitioner was, that he would remain as he was, absent a spontaneous cure which had occurred in few cases (R. 95).

He stated at the time of the trial that periodically petitioner was unable to work (R. 96).

Paul Kline, a graduate mechanical engineer from Missouri School of Mines, employed at the time as a research engineer for American Steel Foundries, testified for petitioner (R. 80). On two occasions he had examined, and on one occasion dissassembled, a retriever. The retriever in question was one belonging to defendant which petitioner had borrowed for the purpose of examination (R. 80). The defendant used only one type of retriever (R. 121). This retriever examined by Kline was shown to be the same type as was on the car when petitioner was injured (R. 66).

Kline described the interworkings of the retriever in detail and explained how it operated (R. 81, 82). He specifically stated that if the retriever recoiled when there was a slow letting out of the rope, that the retriever was defective and was not operating properly (R. 84, 85). He explained that when this occurred, it would result from a defect in the paw mechanism (R. 84). This he said could result from the wearing of the teeth to a point where they

slipped, and then several small springs could cause the retriever to operate without warning (R. 84, 85).

Defendant's witness Elder, who weighed 190 pounds, admitted that the retriever when tripped pulled with such force as to pull him into the car before he could let go (R. 126).

Defendant's witnesses, neither produced the retriever or accounted for its absence. Nor did defendant adduce any evidence concerning its condition at the time of the incident. (R. 25).

Defendant adduced several doctors, who denied, that petitioner was injured as seriously as he contended (R. 104 through 118).

The employees of defendants, who were crewmen on the car, testified, but they failed to witness the actual occurrence and their testimony was primarily directed towards denying that petitioner had informed them of the occurrence. (R. 118 through 127).

The jury found in favor of petitioner and awarded him a verdict of Twelve Thou[illegible]d Dollars ($12,000.00), and the trial Court after denying defendant's motions for new trial and for judgment notwithstanding the verdict entered judgment on the verdict in favor of petitioner (R. 51). Defendant appealed to the Appellate Court for the Fourth District.

The Appellate Court held, that petitioner had made a jury question, but that the verdict of the jury was against the manifest weight of the evidence, and reversed and remanded the cause for a new trial (R. 25, 28).

On petitioner's petition for rehearing, setting up the fact that the Appellate Court was without authority, under the governing Federal rules of law to hold the verdict against the manifest weight of evidence, the Court wrote an additional opinion specifically denying the petition and relied upon its "historical power to reverse and remand a case for

new trial when it believes the verdict to be against the manifest weight of the evidence" for so doing (R. 29, 30).

Petitioner, then pursuant to Rule 75 (2c) of the Illinois Civil Practice Act (Chapter 110, Section 199 (2c) Ill. Record St. 1953) struck the new trial and remanding clause of the Appellate Court's judgment, thus making it final, and sought from the Supreme Court of Illinois the right of leave to appeal from such final judgment, again raising the question of the right of the Appellate Court, under the governing Federal authority, to hold petitioner's verdict to be against the manifest weight of the evidence. (R. pages 1-20).

The Illinois Supreme Court denied petitioner's leave to appeal without opinion and petitioner seeks certiorari to review the now final judgment of said Supreme Court.

The Statute Involved

This suit was initiated under the provisions of the Safety Appliances And Equipment Act, (U. S. C. Title 45 Sec. 1 through 30), which in conjunction with the Federal Employers Liability Act (Title 45 U. S. C. Sec. 51 *et seq.*) will be hereinafter referred to as the act. There is no issue raised as to the act being applicable to the case at bar.

Section 23 of this act, which is relative to this case, reads as follows:

"Use of unsafe locomotives and appurtenances unlawful—Inspection and tests.— It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and

appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act (§§ 22-29, 31-34 of this title) and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. (Feb. 17, 1911, c. 103, §2, 36 Stat. 913; June 7, 1924, c. 355, §2, 43 Stat. 659.)

Argument

The rights granted employees under the Safety Appliance and Federal Employer's Liability Act, are governed by the construction and holdings of the Courts of the United States and not those of the local Courts in the various states.

Bailey v. *Central Vermont Ry. Co.*, 319 U. S. 350 at 352. *Ellis* v. *Union Pacific Ry.* 329 U. S. 649 at 653. *Williams* v. *N. Y. Central Ry. Co.*, 402 Ill. 494-84 N. E. 2d. 399 at 405-406. *Grosse* v. *Terminal Ry. Ass'n of St. Louis*, 307 Ill. App. 414, 29 N. E. 2d. 1018 at 1022.

In *Bailey* v. *Central Vermont Railway*, 319 U. S. 350, the Court said at page 352:

"Section 1 of the Act makes the carrier liable in damages for any injuries or death resulting in whole or part from the negligence of any of its officers, agents, or employees.

"The rights which the Act creates are Federal rights protected by Federal rather than local rules of law (Citing authorities.)"

In *Ellis* v. *Union Pacific Railroad*, 329 U. S. 649, at page 653, the Court said, in regard to the standard of negligence liability in cases under the Act:

"Whether those standards are satisfied is a Federal question, the rights created being Federal rights (Citing authorities.)"

In *Grosse* v. *Terminal R. Ass'n of St. Louis*, 307 Ill. App. 414, 29 N. E. 2d. 1018, the very Court which reversed the case at bar, that is, the Appellate Court for the 4th District, at page 1022 of the Northeastern Reporter recognized this rule and said:

"Therefore, state courts are bound by the decisions of the Federal Courts in such actions." (Citing authority.)

The Appellate Court, in the case at bar, held petitioner had made a prima facie case for submission to the jury. In its opinion it noted that defendant had failed to rebut the inference of a defect in the retriever, on the car, and further stated: "In the absence of such specific rebuttal, plaintiff's evidence taken as true has sufficient probative force to require the issues to be submitted to the jury." (R. 25).

However the Court then went further, and stated that in regard to the evidence concerning the defect, the verdict in the opinion of the Court was against the manifest weight of the evidence.

In this last respect the Court exceeded its Appellate function by weighing the evidence and substituting its opinion for that of the jury.

This Court, the various Circuit Court of Appeals, and the very Appellate Court which decided the case at bar, (in earlier decisions), have all held that the sole function of a reviewing Court in cases under those Acts is to determine whether a submissible case was presented, having done so, the Appellate jurisdiction of the Court is exhausted insofar as the weight of the evidence is concerned.

All of the following cases involve actions under the Act, and amply illustrate this rule.

1. *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, at 35:

2. *Waddell* v. *Chicago E. I. Ry. Co.*, 142 Fed. (2d.) 309, at 309;

3. *Henwood Trustee of St. L. Southwestern Ry. Co.* v. *Chaney*, 156 Fed. 2d. 392, at 398;

4. *Grand Trunk Western Ry. Co.* v. *Heattie*, 48 Fed. 2d. 759, at 761;

5. *Chapman* v. *Alton Ry. Co.* (C. C. A. 7th Cir.), 117 Fed. 2d. 669, at 672;

6. *Ellis* v. *Union Pacific Ry.*, 329 U. S. 649, at 653;

7. *Lavender* v. *Kurn, Trustee of San Francisco Ry. Co., etc.*, 327 U. S. 645, at 652;

8. *Witherbee* v. *Elgin, Joliet & Eastern Ry. Co.*, (C. C. A. 7th C.), 191 Fed. 2d. 302, at 308;

9. *Stanczak* v. *Pa. Ry. Co.*, 174 Fed. 2d. 43, at 47;

10. *Stanford* v. *Pa. Ry. Co.*, 171 Fed. 2d. 632, at 634;

11. *Bolin* v. *Lehigh Valley Ry. Co.*, 167 Fed. 934;

12. *Boston & M. R. R. Co.* v. *Cabana*, 148 Fed. 2d. 150, at 153;

13. *Williams* v. *N. Y. C. R. R. Co.*, 84 N. E. 2d. 399, at 405-406;

14. *Nickell* v. *B. & O. Ry. Co.*, 106 N. E. 2d. 738, at 741, 347 Ill. App. 202 (4th Dist. of Ill.);

15. *Grosse* v. *Terminal R. R. Ass'n of St. Louis* (4th Dist. of Ill.), 307 Ill. App. 414, 29 N. E. 2d. 1018, at 1022.

In *Tennant* v. *Peoria & Pekin Union Railway Co.*, 321 U. S. 29, at page 35, this Court said:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. *It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credi-*

BLEED THROUGH POOR COPY

bility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & G. R. Co. v. McDade, 135 U. S. 554, 571, 572, 34 L. ed. 235, 241, 242, 10 S. Ct. 1044; Tiller v. Atlantic Coast Line R. Co., supra (318 U. S. 68, 87 L. ed. 618, 63 S. Ct. 444, 143 A. L. R. 967); Bailey v. Central Vermont R. Co., 319 U. S. 350, 353, 354, 87 L. ed. 1444, 1447, 1448, 63 S. Ct. 1062. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*"

Again the Circuit Court of Appeals for the Seventh Circuit in *Waddell* v. *Chicago & E. I. R. Co.*, 142 Fed. 2d 309 at page 309, said:

"Defendant makes a rather convincing argument that plaintiff's injuries were not the result of any negligence on its part. It is an argument, however, which could more appropriately be made to the trier of the facts. Any doubt heretofore existing as to the limited scope of our authority on review has been dispelled by recent decision of the Supreme Court. *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Tennant* v. *Peoria & Pekin Ry. Co.*, 64 S. Ct. 409. *No good purpose could be served, therefore, in relating or discussing the testimony further than to ascertain if plaintiff's charge of negligence is supported by any substantial evidence when considered in the light most favorable to plaintiff and together with all inferences which may be reasonably drawn therefrom.*" (Emphasis ours.)

In *Henwood, Trustee of St. L. Southwestern Ry. Co.* v. *Chaney*, 156 Fed. 2d 392, at 398, the Court said:

"The appellant in its brief presents argument relating to *inconsistencies in the testimony of plaintiff's witnesses and to weight of evidence and credibility of witnesses. But the jury has passed on these questions and we are bound by its decision. Tennant, Adm'x,* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520." (Emphasis ours.)

In *Grand Trunk & W. Ry. Co.* v. *Heatlie*, 48 Fed. 2d 759, at 761, the Court said:

"*The contention that the verdicts are against the weight of the evidence cannot be considered* as this court can go no further than determine whether there is substantial evidence to support them." (Emphasis ours.)

In *Chapman* v. *Alton Ry. Co.*, 117 Fed. 2d 669, the Circuit Court of Appeals, the seventh Circuit, had occasion to pass on this precise question. At page 672 of its opinion the Court said:

"By assignment of error the plaintiff urges reversal on the ground *that the verdict of the jury was against the manifest weight of the evidence.* The duty of this court under this assignment is limited to ascertaining if there was any substantial evidence to support the jury's verdict. The credibility of the witnesses, the inferences to be drawn from proven facts, the weight to be accorded the various items of evidence were exclusively for the jury. The rule to be followed is too familiar to warrant extended discussion" (Citing authority). (Emphasis ours.)

In *Lavender* v. *Kurn, Trustee of San Francisco Railroad Co. etc.*, 327 U. S. 645, at page 652, the Court said:

"It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook

BLEED THROUGH POOR COPY

to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (Citing cases.) See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73.

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Emphasis ours.)

In respect to the very Appellate Court who wrote the opinion in the case at bar, no Federal authority is cited for its holding, that it has the authority to hold this case against the manifest weight of the evidence.

It cites only the case of *Robertson* v. *Louisville & N. R. Ry. Co.*, 327 Ill. App. 44-63 N. E. 2d 608, a case which was decided by this same Court in 1945. This *Robertson* case has never been cited except by reference made to it in the case at bar.

The same Appellate Court which wrote the opinion in the case at bar, has previously held contrary to its present holding in other Federal Employer Cases decided by it. These cases correctly followed the federal rule.

First in *Grosse* v. *Terminal R. Ass'n. of St. L.*, 307 Ill. App. 414, 29 N. E. 2d 1018, at page 1022 of the Northeastern Reporter, the Court said:

"*The federal courts have held that the fact that the verdict and judgment are against the weight of the evidence are not for the determination of an appellate court.*" (Citing authority.) (Emphasis ours.)

Again, in *Nickell* v. *Baltimore & O. R. Co.*, 106 N. E. 2d 738, 347 App. 202, this same Court, which reversed the case at bar, with the writer of the opinion in the case at bar, concurring with another justice (one Justice dissenting), announced and followed the correct rule in this type of case, saying at page 741 of the Northeastern Reporter:

"Under the circumstances, questions of contributory negligence of defendant Railroad Company were questions of fact for determination by the jury, Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; Tennant v. Peoria & P.U.R.R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; Williams v. New York Central R. R. Co., 402 Ill. 494, 84 N. E. 2d 399. We cannot say under the facts before us that the verdict of the jury was not supported by the evidence and a directed verdict, under the facts in the record, would have been improper. Wilkerson v. McCarthy, supra; Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916. Once an evidentiary basis has been established for

BLEED THROUGH POOR COPY

the jury's verdict the Court is required to uphold such conclusion, even though such Court might draw contrary inferences or feel that another conclusion is more reasonable." (Emphasis ours.)

All the foregoing cases involve actions under either the Safety Appliance or Federal Employers Liability Act. They unequivocally hold that the Appellate Court's function in reviewing these cases is exhausted, once it has determined that a submissible case was presented. They specifically enjoin the weighing of the evidence in order to set aside a verdict, as was done in the present case. Counsel for respondent can cite no Federal Case arising under the Safety Appliance Act or Federal Employer's Liability Act where a Federal Court has held that the Appellate Court could weigh the evidence and reverse because the verdict was against the manifest weight of the evidence.

The opinion of the Court in the present case is squarely in opposition to the governing Federal law. The case is squarely within the category of cases requiring certiorari, that is where there is a conflict between the highest state Court (here the Supreme Court of Illinois who refused petitioner's leave to appeal) and the Federal Courts being both the various Circuit Court of Appeals and this Honorable Court as well.

No other reason should need to be adduced to warrant the granting of this writ. However, since it is apparent that even if the Court here had the authority to hold the verdict against the manifest weight of the evidence, (which is conceded only for argument) it acted erroneously in so doing.

First, it must be remembered that the Federal Courts including this Honorable Court have frequently reiterated in cases under the acts, that the Appellate Court cannot search the record to find some conflicting version of the incident, nor can it draw contrary inferences once an evidentiary basis has been established for the jury's verdict.

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29 at 35—(quotations to this effect have been previously noted, and therefore are not repeated for the sake of brevity).

The Court held this action against the manifest weight of the evidence, on the assertion that the evidence regarding the defect in the retriever was such that if plaintiff's expert's testimony were taken as true the retriever would not operate normally, and that the evidence showed it did operate properly after the incident (R. 26).

This the Court held was irreconcilable and warranted a reversal.

In regard to the testimony regarding the expert witness further note will be made later.

Regarding the normal operation of the retriever after the incident the following was the evidence.

The sole basis for the Courts saying that the retriever "operated normally" after the incident, was the statement of Harsh after the incident—at page 75 of the Record, he said this, about the retriever: "It doesn't necessarily have to be set when you place it under the hook. *I presume he reset it.* I saw him pull it out."

The retriever was never brought into court or its subsequent disposition by the company ever accounted for (R. 25).

Plaintiff's statement, that the retriever was presumably reset and placed on the hook, was speculative, in so far as the presumption was concerned, and was in no way a positive statement that the retriever was operating normally. In fact, as we shall see when we analyze the testimony of petitioner's expert witness, the retriever could have been easily reset and still not have operated normally on every occasion.

None of the defendant's occurrence employees makes any statement about the fact that the retriever was reset, or that

it was in any way used on the return trip. Their statements were simply that it was under the hook. (See R. 119, 120, 125, 126, 130).

Nor do I believe this Court's construction of the statement of plaintiff's expert to the effect that the retriever would not operate normally at all is one that should necessarily follow.

This witness stated that in his opinion the defect causing the retriever's failure to operate properly was:

"My opinion is that the paw mechanism would be some fault in the paw mechanism. There would be several reasons why it would cause it not to work properly. The main reason would probably be where the teeth would probably be worn to a point where it would slip this dog out, which would cause it to retrieve. There are several small springs involved in this that would cause it to retrieve without any warning" (R. 84).

In view of this witness' testimony concerning the interworkings of the machinery of the retriever (R. 80 and 81), it is very conceivable, that where an interlock was made with an unworn gear tooth of the retriever, the latter would properly operate, whereas, if the retriever were to be wound where it was set with one of the gear teeth which was worn, the retriever would not work properly, and this was apparently the situation when plaintiff was injured.

The statement by this witness, that the retriever would not work normally at all was based on this final question: "* * * if the paw were worn and springs broken would it work normally at all?" (R. 85).

The witness' opinion as to the cause of the retriever's failure to work properly, as before noted, was based on several things that could have been wrong with the retriever, that is, that the paw mechanism was not working properly, or the teeth being worn caused slipping, or that there were several small springs involved that could cause

it to retrieve without warning. This witness did not specifically say which one of these caused the failure in the instant case, as he was in no position to know this, and defendant did not produce the retriever. His statement, that it would not work normally at all if both the paw and springs were broken, is probably correct, but does not pass upon the question whether it would work normally at all, if just one of these things were defective.

So we can see that the reasons adduced by the Court for holding the verdict against the manifest weight of the evidence will not stand circumspection.

The Court first reasons that because petitioner stated he presumed the retriever was reset it was "operating normally". This inference is certainly a presumed one under the evidence, and when the Court then attempts to parlay this, with the expert's alleged opinion, that this would be impossible, the Court's reasoning becomes untenable, for we have seen that the expert's testimony is not reasonably subject to such a construction.

We believe it is apparent that the Court, in the instant case, has erroneously weighed the evidence, if it should be found that it ever had such a right. This latter action, in itself, would be sufficient for this Court in the exercise of its supervisory powers to grant the Writ.

Wherefore, petitioner respectfully prays, that a Writ of Certiorari be issued out of this Honorable Court to review the judgment of the Supreme Court of Illinois in this cause, and for such other relief as to this Court may seem proper.

Dated May 29, 1954.

WAYNE HARSH,
Petitioner,

By MORRIS B. CHAPMAN,
Attorney for Petitioner.